BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2019-281-S

IN RE:	)	
	)	**REPLY TO RESPONSE OF**
Application of Palmetto Utilities, Inc.	)	**OFFICE OF REGULATORY**
for adjustment of rates and charges	)	**STAFF TO APPLICANT'S**
for, and modification to certain terms	)	**MOTION TO STRIKE AND**
and conditions related to the provision	)	**FOR SANCTIONS**
of sewer service.	)	
_____	)	

Applicant, Palmetto Utilities, Inc. ("PUI" or the "Company"), pursuant to S.C. Code Regs. 103-829.A (2012), and in accordance with Order No. 2020-46-H, submits its reply to the South Carolina Office of Regulatory Staff ("ORS") June 12, 2020, Response to the Company's June 5, 2020, Motion to Strike portions of the pre-filed direct testimony of three ORS witnesses and for the imposition of sanctions ("Motion"). For the reasons set forth herein and in the Motion the Company's requested relief should be granted.

I. INTRODUCTION

In a brazen display of misrepresentations and material omissions of fact, coupled with a tortuous misreading of S.C. Code Ann. §58-4-55 reminiscent of "*The Emperor Has No Clothes*" fable, ORS recommends that this Commission aid it in depriving PUI of a fair rate relief proceeding. Ignoring clear warnings from the South Carolina Supreme Court in one case which directly addressed ORS misconduct and in another case which requires ORS personnel to act with the same integrity and equity required of all state agency personnel – both of which are cited in the Motion but *ignored* in ORS's Response – ORS doubles down on its effort to deprive PUI of that fair proceeding by misrepresenting the Company's level of cooperation in ORS's audit, examination and inspection. And in so doing, ORS not only ignores its statutory duty to preserve investment in and maintenance of utility facilities, it seeks to drag the Commission down to its level of impropriety.

The Commission should see ORS's conduct for what it is: an unseemly effort to ignore the plain meaning of a statute to foster the false impression that PUI has not cooperated in the ORS audit, examination and inspection in this matter as a basis to exclude an $18 million investment

made by PUI which is now part of used and useful plant. The Commission must forcefully reject ORS's misconduct and refuse to accept a recommendation that is contemptuous of not just the Commission's prerogative under that statute, but the admonition of the South Carolina Supreme Court that ORS is obligated to respect the legitimate financial interests of a South Carolina business and provide it a fair rate relief proceeding.

II. FACTS

In its Response, ORS does not delineate which portion thereof pertains to the facts underlying this matter. *Compare* Motion at 2-3. This is not simply a criticism that ORS has failed to comply with S.C. Code Regs. 103-804.O and 103-819.C (2012) (which it has), but an observation made to point out that ORS does not wish to be held accountable for asserting as fact matters which are later shown to be inaccurate – and in some instances, knowingly untrue. In order to provide the Commission with the proper factual context within which to analyze ORS's arguments in opposition, the Company provides the following list of demonstrably inaccurate assertions or material omissions of fact by ORS in its Response.

A. PUI is not "suddenly" suggesting ORS's demands made under §58-4-55 are not "Discovery" or that the information produced by the Company is confidential.

After spending nearly three pages claiming that PUI's motion is unclear, reciting portions of §58-4-55, re-asserting the fiction that ORS has engaged in discovery within the ambit of that statute, and essentially saying "this is how we always do it," ORS asserts "it is disingenuous for the Company to now **suddenly suggest it did not know ORS was conducting discovery** to prepare its case and testimony," (Response at 5) and that "**PUI now suddenly asserts** shortly before the … hearing that all of **the information it provided** … under §58-4-55 is **confidential as a matter of law**." (Response at 6; emphasis added). On both accounts, ORS's own actions belie this statement and demonstrate that ORS is being disingenuous.

To begin with, ORS has not filed a single one of its 416 demands for production under §58-4-55 (see Motion Ex. A, ¶ 3) with the Commission.[1] If these demands had constituted discovery,

[1] It is quite reasonable to assume that one reason ORS eschews its statutory right to engage in discovery under §58-4-55(D) is because it does not want the Commission to know the magnitude or subject matter of its demands for production. ORS's suggestion that it will henceforth be willing to file copies of its demands for production if directed to do so by the Commission (Response at 13) is the classic "empty offer." ORS has already (but unlawfully) filed with the Commission PUI's responses to demands made under §58-4-

ORS would have been bound to file them with under S.C. Code Regs. 103-833.B – an obligation which the Intervenors in this proceeding have complied with. The fact that ORS did not do so is conclusive evidence that it did not consider its demands under §58-4-55(A) to constitute discovery under §58-4-55(D). Further, the ORS demands on their face make it abundantly clear that these requests are made under §58-4-55(A). *See* Response Ex. 1 (referencing §58-4-55 and describing these requests as "audit information requests" and "audit requests" – not interrogatories or requests for production of documents under the Commission's regulations for discovery). There is no reference in ORS's demand to discovery, interrogatories, or requests for production as contemplated under R. 103-833, nor §58-4-55(D). Thus, there is nothing "sudden" about PUI's recognition that ORS has not once engaged in discovery in this case – because it never did.

Furthermore, and as will be demonstrated in the discussion in Part II.B below, ORS well knows that PUI has consistently asserted that all of the information it produced to ORS is confidential and proprietary under §58-4-55. Its contention of "suddenness" on PUI's part in taking this position, suggesting that only when PUI filed its Motion did it assert confidentiality under the statute, is frustratingly untrue.

B. <u>PUI's Responses to ORS's Requests did not recognize any obligation to identify Confidential Information – and ORS well knows its contrary assertion is false.</u>

As it is wont to do (*see*, e.g., discussion at Motion p.6), ORS engages in selective and incomplete recitations of fact in order to spin its conduct as proper in its description of the Company's responses to Audit Information Request #8 and Accounting Information Requests 19.1.c and 19.1.D. Response at 6. There, ORS asserts that because certain information supplied to it by Company counsel was marked "confidential," PUI has "engaged in a course of conduct in this case recognizing its obligation to place confidentiality designations on or otherwise making ORS directly aware of information it produced to ORS was entitled to such protection."

Attached hereto and incorporated herein by reference as Reply Exhibit "A," are copies of the January 16, 2020 e-mail communications between counsel for PUI and ORS regarding Audit Information Request #8. Therein, Company counsel recounted his conversation with ORS counsel regarding the reasons *why* the information was being marked confidential and being delivered by

55(A) that it wants the Commission to see, and ORS well knows that this Commission – as would any tribunal – does not wish to be burdened with unnecessary filings. This is just another of the artifices that ORS uses to mislead the Commission.

counsel instead of Company personnel – i.e., that it was "internally sensitive from the perspective that it contains salary, incentive compensation, and/or bonus information which not all persons associated with the rate case are authorized to access." Accordingly, this email further asks that any questions regarding that information not be directed to Company personnel working on the rate case, but only to the Company's counsel. And, most tellingly, this email expressly states that the information is "**already … confidential and non-disclosable** under the SC FOIA **under the provisions of S.C. Code Ann. §58-4-55**." (Emphasis supplied.) After being notified of the impending delivery of the "flash drive" containing this information, and upon its receipt, counsel for ORS simply responded that he had received same.

At no time did ORS counsel assert that ORS considered the information to be confidential only because it was marked as such under these circumstances or take issue with the Company's position that the confidential and non-disclosable nature of the production under the statute pre-existed its delivery. The documents attached as Exhibit 2 to the ORS Response merely confirm that this is the reason why the information was marked confidential and in no way support ORS's argument otherwise. In short, PUI marked the information confidential only (1) to ensure that it was not disclosed by ORS to PUI personnel engaged in work on the rate case who were not authorized to access it and (2) to reiterate to ORS that the information was also confidential and non-disclosable under the statute. Even though ORS knew that to be the case at the time and knows it now, it has submitted to the Commission an argument that is based on an utterly false premise. **ORS should be ashamed**.

Also conveniently omitted from mention in ORS's Response is the fact that ORS entered into two separate agreements with PUI which expressly acknowledge PUI's position that the information that it produced under §58-4-55 was confidential as a matter of law. In separate agreements reached between PUI and the two intervenors in this case, both of which requested access to information provided by the Company to ORS under that statute, PUI clearly asserts this position. ORS not only acknowledged that this is PUI's position, but also agreed that providing this information to the intervenors would not constitute a waiver of PUI's rights under §58-4-55. Copies of these agreements and ORS's acknowledgment of same are attached as Reply Exhibits "B" and "C." Once again, even though ORS knew at that time (and knows it now) that PUI was claiming that its production to ORS pursuant to §58-4-55 was confidential as a matter of law, it

has submitted to the Commission an argument that is based on the false premise that PUI has acted in a contrary manner. **Once again, ORS should be ashamed**.

This stunning lack of candor on the part of ORS goes to the heart of the Supreme Court's admonitions in *Daufuskie* and *Peake,* and is a desperate attempt to deceive the Commission into lending its imprimatur to **further ORS misconduct** – all of which is designed to support the false suggestion of two ORS witnesses that PUI did not cooperate in the ORS audit, examination, and inspection. The ORS contention that PUI is obligated to designate matters as confidential (see Response at 5-6)[2] before it can receive the benefit of the protections afforded to a utility under §58-4-55(A), and the utterly false assertion that PUI has done so in this proceeding on some limited basis, should not only be firmly rejected by the Commission, the Commission should consider it to be additional grounds for imposing sanctions on ORS.

C. <u>PUI has never asserted that ORS agreed to take action regarding the scope, extent, and content of Mr. Hunnell's demands under §58-4-55 at the February 19 meeting – even though such action did get taken by ORS in this Proceeding – and Mr. Thompson's affidavit omits material facts.</u>

With respect to the parties' meeting on February 19, 2020, ORS asserts that "no agreement for ORS to limit or cease serving discovery on PUI was reached or even discussed." Response at 16. This assertion is only partly accurate; it is a straw-man argument relying upon an incomplete recitation of facts to avoid the real issue presented by PUI's Motion. Nowhere in the Motion does PUI ever assert that ORS agreed to take any action after PUI expressed its concerns regarding the nature and extent of demands for production (*not* discovery) being made by Mr. Hunnell at the February 19, 2020 meeting.[3] To the contrary, PUI has simply pointed out the indisputable fact that,

[2] In note 3 of its Response, ORS states that "some utilities sign a memorandum of understanding" which obligates them to designate documents which they assert to be confidential and notes that "such a memorandum was never discussed" by PUI and ORS in this proceeding. PUI is certainly not bound by what other utilities may or may not do. Moreover, the point ORS makes is academic since PUI has clearly and consistently stated to ORS in this proceeding that it claims its right to confidentiality of all documents produced under §58-4-55. Moreover, if §58-4-55 obligates a utility to designate as confidential matter it produces to ORS under that statute as ORS contends is the case, **the Commission should wonder why any such memorandum is needed**. The Company submits that the obvious answer is that ORS knows that without such an agreement, a utility has no such obligation. The fact that ORS admits that no such memorandum was discussed is also evidence that ORS was aware that PUI has consistently asserted its right to have all responses it provides afforded the confidential and proprietary protections of §58-4-55(A) – not the opposite.

[3] In support of its mischaracterization of the Company's argument, ORS also misstates the content of Motion Ex. A, the affidavit of Lauren B. Hutson. ORS cites to paragraph 4 of this affidavit as support for

after PUI expressed its concerns to ORS about Mr. Hunnell's first 114 demands, ORS permitted him to issue another 56 demands – including those in which the Company's responses containing its **unchallenged objections** were impermissibly filed in violation of §58-4-55(A).

Further, ORS's argument in this regard fails to mention that ORS counsel had – prior to the February 19, 2020 meeting – previously agreed to withdraw a February 13, 2020 demand made by Mr. Hunnell, which had been identified by the Company as not constituting a demand for books, records and information needed for ORS to conduct its audit, examination, and inspection in this proceeding. Specifically, Water Operations Request #20 improperly sought a stipulation from PUI. When counsel for PUI brought this to the attention of ORS counsel, ORS withdrew the request. *See* Affidavit of John M. S. Hoefer, copy attached as Reply Exhibit "D" and Exhibit 1 thereto. Because it was withdrawn, this request was not included in the 170 requests of Mr. Hunnell identified in Exhibit A to the Motion and was never responded to by PUI. *See* Affidavit of Lauren B. Hutson, copy attached as Reply Exhibit "E." The candor of ORS counsel Nelson in recognizing that ORS is not entitled to demand that utilities enter into stipulations under §58-4-55 stands in stark contrast to ORS's effort, relying on the content of Mr. Thompson's affidavit, to support opposition to an assertion that PUI has never made.

Similarly misleading, is ORS's argument that "*PUI also alleges that ORS should not have continued to issue discovery requests after the Commission stayed the proceeding on March 25, 2020*." Response at 18. First, PUI did not characterize ORS's demands as "discovery", nor did PUI's Motion makes such allegation. Rather, in its recitation of facts, PUI merely pointed out (1) that ORS continued to pursue demands for production under §58-4-55 even though all proceedings had been stayed and (2) that PUI nevertheless complied with these requests. *See* Motion at 2. This statement merely buttresses PUI's assertions that it has fully cooperated with ORS's audit, examination, and inspection in this matter – particularly in view of the pre-filed testimony of ORS witnesses Hunnell and Loy suggesting otherwise. PUI submits that ORS's proclivity to create strawman arguments only illustrates that ORS is bent upon depriving PUI of a fair rate relief proceeding and obfuscating its own improper behavior.

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its contention that "[t]hrough its filings, PUI would have the Commission believe that the parties came to such an agreement with its characterization of the February 19, 2020, meeting." Ms. Hudson's affidavit makes no reference whatsoever to any agreement. To the contrary, her statement in paragraph 4 is expressly limited to the ORS demands for production made by Mr. Hunnell and the Company's objections to some of them.

Mr. Thompson's affidavit, Response Ex. 4, is yet another ORS exercise in omitting material facts that are inconvenient to ORS' post hoc narrative of non-cooperation by PUI. Indeed, ORS asked PUI at the February 19 meeting to provide additional information regarding the amounts recorded in Uniform System of Accounts Account Number 114 and a reconciliation with the Company's balance sheet, and for a contemplated follow-up meeting that was never held. However, Mr. Thompson (conveniently) fails to mention that the additional requested information was provided to ORS by Ms. Hutson on March 9, 2020 and accepted by ORS, and thus the need for the planned meeting obviated.[4]

Finally, ORS is correct that PUI has not sought relief from the Commission regarding ORS's conduct in this matter with respect to its improper demands for books, records and information as it could have done under §58-4-55(B). Response at 17.[5] Rather, PUI sought to have ORS address it through the communications prior to and at the February 19 meeting of the parties, and ultimately by way of the Company's objections (that ORS took no action to challenge). And even though it continued unabated,[6] this conduct would have never been an issue for the Commission to consider but for the fact that ORS has violated §58-4-55(A), by repeatedly publicly disclosing the Company's responses to these demands without Commission permission and using them to present the utterly false impression that PUI did not cooperate with ORS in its audit, examination and inspection. In addition to being a clear violation of the statute, this post hoc effort to suggest that ORS's witnesses were somehow hindered in their ability to prepare their testimony is precisely the kind of overreaching misconduct that ORS was admonished by the Supreme Court

[4] Should the Commission determine to grant ORS's motion to file under seal and review the exhibits to Mr. Hunnell's testimony, PUI invites the Commission's attention to DPH-Exhibit 9, which consists of a copy of the reconciliation that PUI provided to ORS on March 9, 2020.

[5] And, as is reflected in PUI's Motion, ORS has never taken action to address any alleged deficiency in the Company's responses under §58-4-55(A) nor has it challenged before the Commission PUI's objections to the demands attached to the testimonies of its witnesses Hunnell and Loy under §58-4-55(B)(2). Motion at 6. Instead, knowing full well that the Company has consistently asserted that the Company's responses to ORS's demands for books, records and information were confidential as a matter of law, see discussion at pp. 3-5, *supra*, ORS has chosen to engage in (what can at best be characterized as) gamesmanship that the Commission should reject just as it did in Docket No. 2018-2-E.

[6] It is beyond cavil that these concerns were legitimate given ORS's withdrawal of Water Operations Request #20, its admission that at least five of its demands were "duplicative or identical" due to inadvertence (*see* Response at 18), and ORS's failure to take any action challenging the Company's objections to the demands made by Mr. Hunnell which are improperly attached to his and Mr. Loy's testimonies -- other than improperly complaining about them in these testimonies.

in *Daufuskie* not to engage in, and the inequitable conduct which all state agencies are warned to avoid in *Peake*.

Notably, the Court has also observed that the Commission "does not serve as a rubber stamp for ORS's recommendations." *See Utilities Services of South Carolina v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 115, 708 S.E.2d 755, 765 (2011). Accepting ORS's false and incomplete factual statements as a factual background for applying §58-4-55 exposes the Commission to criticism under each of these precedents, and the Commission should consider ORS's legal arguments through the prism of ORS's additional misconduct in this regard.

III. REPLY ARGUMENT ON THE LAW

The arguments made by ORS regarding the proper reading of §58-4-55 are devoid of merit. Their arguments are internally inconsistent, ignore the plain meaning rule that binds this Commission, and seek to impose upon PUI a burden which may have existed under a prior version of that statute (but no longer does).

A. <u>The Commission is Bound by the Plain Meaning Rule</u>

"Where [a] statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Commission need only consider the first two sentences of §58-4-55(A) to see that ORS's entire argument seeks to have the Commission contravene this rule. These two sentences state as follows:

> The regulatory staff, in accomplishing its responsibilities under Section 58-4-50, may require the production of books, records, and other information to be produced at the regulatory staff's office, that, upon request of the regulatory staff, **must be submitted** under oath and **without the requirement of a confidentiality agreement or protective order being first executed or sought**. **The regulatory staff must treat the information as confidential or proprietary unless or until the commission rules such information is not entitled to protection from public disclosure** or the public **utility** or electric cooperative **agrees** that such information is **no longer** confidential or proprietary.

Id. (emphasis supplied).[7] There is no ambiguity in this mandatory language which places **on ORS** the obligation to accept the information produced by a utility under this section without any

[7] Essentially the same language in these two sentences and the next sentence of the statute is later included in §58-4-55(D). The Company's arguments regarding subsection (A) are incorporated as arguments

confidentiality agreement or protective order, and to treat it as confidential and proprietary unless otherwise ordered by the Commission or agreed by the utility. In its haste to create the false impression that the Company had not cooperated with ORS's audit, examination and inspection, ORS blew past the Commission's prerogatives and PUI's rights under the plain meaning of the statute.

ORS's erroneous assertion that this statute obligates a utility to designate matter as confidential (Response at 6-7) is pinned on its improper construction of the next sentence, which reads as follows:

> Unless the commission's order contains a finding to the contrary, all documents or information **designated as confidential or propriety pursuant to this subsection** are exempt from public disclosure under Sections 30-4-10, et seq., and the regulatory staff shall not disclose such documents and information, or the contents thereof, to any member of the commission or to any other person or entity.

Section 58-4-55(A) (emphasis supplied).

In addition to being inconsistent with the plain language of the preceding sentence, ORS's interpretation of this sentence ignores that the General Assembly has designated this material as confidential and proprietary for the *additional purpose* of making it clear that this material is also exempt from disclosure under the Freedom of Information Act.[8] Indeed, ORS has itself asserted that it is the plain language (not some tortured reading as it maintains later) of the statute which supports its construction of the statute. *See* Response at 7 ("[t]he plain language of §58-4-55(A) and (D) imparts an obligation on utilities to place confidentiality designations on information").[9] The Commission must reject ORS's reading of the statute or violate the plain meaning rule.

The fact that ORS may not like the General Assembly's determination to declare all information provided to ORS pursuant to the statute confidential and proprietary is of no moment and certainly not a basis upon which the Commission may deviate from the plain meaning rule.

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regarding the meaning of this latter subsection to the extent the Commission finds that ORS's requests did constitute "discovery" within the meaning of subsection (D) – which PUI disputes is the case.

[8] See S.C. Code Ann. §30-4-40(a)(4) ("[a] public body may, but is not required to exempt from disclosure … [m]atters specifically exempted from disclosure by statute").

[9] This contention, when considered in the context of ORS's companion argument that the plain meaning of the statute leads to an absurd result (Response at 7), is contradictory and the epitome of circular logic.

South Carolina courts have uniformly rejected efforts to interpret the plain meaning of statutory language based upon a party's disagreement with the policy expressed by the legislative language – including in cases involving decisions of a state agency. *See, e.g., Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151–52, 447 S.E.2d 228, 230 (Ct. App. 1994), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996), holding in an appeal arising out of a determination by the Worker's Compensation Commission that

> [t]he primary function of the court in interpreting a statute is to ascertain the intention of the legislature. In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. The court cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute; to legislate and not to interpret. However, this court has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts. There is a marked distinction between liberal construction of statutes by which the court determines their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced."

(Citations omitted.)

Whether ORS finds the plain language of §58-4-55 to be an unwise policy choice by the General Assembly, that is no basis upon which that language may be ignored. *See S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 786 (1949) ("[w]e repeat the trite observation that courts are not concerned with the policy or wisdom of law but only with its validity and meaning"). *See also Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 649-50, 760 S.E.2d 103, 104 (2014) (holding that "it is not within our province to weigh-in on the wisdom of legislative policy determinations" and that "it is not the function of courts to pass upon the wisdom or folly of municipal ordinances"). (Citations omitted.)

B. <u>The only absurdity is found in ORS's argument, not the plain language of the statute.</u>

After having made the contradictory argument that the plain language of the statute imposes a burden on PUI to designate matter produced to ORS as confidential (*see* n. 9 and related discussion, *supra*) ORS pivots to asserting that the plain language of §58-4-55 requiring ORS to treat such matter as confidential and non-disclosable may be ignored because its application leads to an absurd result. The lone authority cited by ORS for the proposition that the plain language of §58-4-55 is unenforceable for this reason is *Kiriakides v. United Artists*, 312 S.C. 271, 440 S.E.2d

364 (1994). This opinion fails the ORS inasmuch as it cannot meet the high standard required therein to ignore the plain meaning of an enactment of the General Assembly. *Kiriakides* requires "a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Id.*, 312 S.C. at 275, 440 S.E.2d at 366. To arrive at ORS's position that the General Assembly "could not have possibly intended" that documents and information provided by a utility in a contested case proceeding be treated as confidential, proprietary and non-disclosable by ORS without any action on the part of the utility, the Commission must assume that the General Assembly intended its 2018 amendment to the statute imposing that requirement to have no effect. This the Commission may not do. *See Senate by and Through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (holding that the Supreme Court "must read [a] statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law'") (citations omitted).

But, given the "parade of horribles" set out by ORS as to why it cannot be bothered with complying with the statute's plain meaning, the Company will respond to its contrived arguments asserting that application of the plain meaning leads to an absurd result. For example, ORS contends that:

> "the purpose of 58-4-55 is to assist ORS in carrying out its responsibilities … to 'review, investigate and make appropriate recommendations to the [C]omission'" in rate relief proceedings and it would therefore be "absurd" for the Company to be able to produce to ORS under §58-4-55 documents which are "in the public domain" yet have them protected from public disclosure.[10] *See* Response at 7-8.

There is no absurdity in this –ORS is merely unwilling to do its job in the express manner required by the General Assembly. As the last clause of the second sentence of §58-4-55(A) permits, ORS is free to seek the agreement of a utility that information is no longer confidential or proprietary. ORS has readily admitted that it does just that on occasion but did not in this case. *See* Response n.3, Reply n.2, *supra*. Further, if a utility is unwilling to surrender its statutory right to the protections afforded its information under §58-4-55, the General Assembly has given ORS the ability under §58-4-55(B)(2) to seek relief from the Commission -- something ORS failed to do in

[10] One might reasonably question why ORS would have any need to demand production of documents which are already in the public domain.

this case --but instead engaged in an impermissible disclosure. Only in ORS's twisted view of its authority as a creature of the legislature is complying with the plain meaning of a statute -- that fully empowers it to take actions that will allow it to discharge its perceived statutory duty -- an absurd result. This is not a matter of a utility seeking to protect "a piece of paper stating 'the sky is blue'" as ORS contends. Response at 8. Rather, this is a matter of ORS crying that "the sky is falling" because a utility is requiring that ORS follow the law and ORS does not want to be bothered with doing so. The Commission should reject ORS's "absurd result" argument.

ORS's arguments about certain content the Company contends has been wrongfully disclosed (Response at 8) only illustrates PUI's main point in bringing the instant Motion – which is that ORS is obligated to obtain a utility's agreement that matter will no longer be treated as confidential or Commission relief before it can disclose that information -- and it has failed to do so. The Company does not dispute that information in the public domain may well be included in documents produced in response to ORS's demands under §58-4-55.[11] However, only *after* violating the statutory proscription against disclosure does ORS now seek to have the Commission absolve it of its misconduct by relieving it of a burden expressly placed on it – i.e., demonstrating that something should be excluded from the mandatory statutory protections against disclosure imposed by the General Assembly. Further, ORS now seeks to put on PUI a burden to demonstrate that matter produced is confidential or proprietary – a burden that the General Assembly has plainly said a utility does not bear. The Company submits that ORS knows exactly how to use information produced by the Company without violating §58-4-55 -- as it has done so throughout the pre-filed direct testimony of ORS witness Christina L. Seale; Ms. Seale's testimony contains

[11] ORS's reference (Response at 8, n.4) to public information concerning **reported** sanitary sewer overflows (SSOs) is especially revealing. The Commission should question why ORS would need to ask the Company to produce information that ORS admits is readily available to it on-line from another governmental agency – in fact the governmental agency which is the authoritative source in this regard – and wait to do so until 168 days after an application is filed. *See* ORS Water Operations Request No. 31, May 13, 2020, copy attached as Reply Exhibit "F." Moreover, the Commission should question why any reference to or disclosure of the Company's response to ORS Water Operations Request No. 31 would be needed for Mr. Hunnell to make a point about the Company's SSOs. PUI submits that the answer is obvious: ORS perceives itself to be impervious to any reasoned, measured approach to its statutory duties and asks for information which it does not need to do its job. If there were ever any doubt that ORS is wrong in this regard, the Supreme Court's holdings in *Daufuskie* should have disabused it of any such notion. Apparently, it did not and ORS has now engaged in misconduct which the Commission must itself address in order to give the Company the fair rate relief proceeding to which it is lawfully entitled.

dozens of adjustments, many of which are based upon information supplied by the Company, but only discloses (albeit incompletely) information produced by the Company for one of these adjustments.

ORS asserts that events arising out of communications between counsel for PUI and ORS on May 26, 2020, demonstrate "[t]he absurdity that results from PUI's interpretation" of §58-4-55.[12] Tellingly, ORS's recitation of the events is not supported by any sworn statement from its counsel involved. The Company submits the affidavit of its undersigned counsel to address the order, purpose and content of these communications. See Reply Ex. "D." Suffice it to say that the inability of PUI's lone counsel to digest the entirety of eight (8) sets of ORS witness testimony and exhibits developed with the input and assistance of at least three (3) ORS counsel within an hour of having received it and identify for ORS every violation of §58-4-55 is no basis upon which to determine that ORS may be excused from its misconduct. Sadly, that is ORS's reaction to an effort of PUI counsel to raise its client's justifiable concerns in a cooperative and collegial manner. More to the point, these events do not illustrate any absurdity in the plain meaning of the statute, but only acknowledge the statutory requirements, as evidenced by ORS's efforts to "un-ring the bell" that tolled when ORS disclosed protected information to the Commission staff.

C. <u>ORS, not the Company, is attempting to overcome matter unfavorable to its position.</u>

The incorrect ORS contention that PUI may be seeking to "strategically strike testimony unfavorable to its position on key issues in the case" (Response at 10) is refuted (i) by ORS's acknowledgment that certain of the information is public information that is incapable of contradiction (e.g., the number of SSOs reported by the Company to DHEC), (ii) by ORS's complaint that PUI counsel initially raised its concerns based upon the improper testimony of only one ORS witness (Response at 9), and (iii) by the content of the exhibits to Mr. Hunnell's and Mr. Loy's testimonies reflecting that the Company objected to the requests made by ORS. The purpose of the Company's Motion is to require that ORS comply with its statutory duties and prevent it from making (on a post hoc basis) the false but injurious claim that ORS could not perform its duties regarding its analysis of the $18 million investment in facilities acquired from the City of

[12] As noted above, the Company disagrees that there is any need for interpretation given the plain meaning of the statute.

Columbia due to a lack of cooperation by the Company.[13] ORS asserts that "the only way … ORS can comply with the standard PUI wants to create, is [to] provide its testimony to a utility ahead of the filing deadline so the utility can review and tell ORS what portions it believes would violate §58-4-55 if filed with the Commission" (Response at 10). That is simply ludicrous.

The Company is not creating any standard -- it is asserting its rights under an unambiguous statute as ORS has long known. *See* Reply Ex. "A." Furthermore, ORS has the ability under §58-4-55(A) to identify any information it believes it needs to disclose to either the utility or the Commission and seek relief by agreement or Commission order, respectively. This can be done far in advance of any testimony pre-filing deadlines. What ORS is really saying here is that an agency -- with **at least** six employees directly involved in the case, (five witnesses plus the Executive Director who is an attorney), two expert witnesses (whom ORS seeks to have paid for by PUI's customers), and three counsel of record -- cannot be bothered to identify documents designated by the General Assembly as confidential, proprietary and exempt from disclosure under the FOIA that it wants disclosed (and then seek either utility authorization or Commission approval to disclose them).

This is not a question of the plain meaning of legislative enactments yielding absurd results. It is an administrative agency bent upon ignoring legislative and judicial directives for the simple sake of its own convenience. The Commission should not accept as reliable a recommendation of this sort.[14]

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[13] Pages 14-16 of ORS's response largely consist of argument that the testimonies of its witnesses Loy and Hunnell which the Company seeks to have stricken are proper because they pertain to subjects which the Company may respond to in rebuttal testimony or on cross examination and that Commission Order No. 2018-708 did not result in the striking of any testimony or exhibits. Without accepting these arguments, PUI would note that they miss the point: ORS has already engaged in conduct which violates its clear statutory duty. If the Commission accepts ORS's contention that it lacks authority to impose a monetary sanction (*see* discussion at p.15, *infra* on this point) striking testimony is the only means by which the Commission can deter ORS from future misconduct. Quite obviously, the Commission's rejection of ORS's post hoc assertion in Docket No. 2018-2-E that a party in that proceeding had not cooperated with ORS was insufficient to deter ORS from employing the same improper tactic in this case. The only difference now is that ORS has violated an express charge of the legislature. This amounts to misconduct on the part of ORS which the Commission is not only authorized, but obligated, to address under *Daufuskie* in order to ensure PUI a fair rate relief proceeding.

[14] Continuing its pattern of mischaracterizing PUI's arguments, ORS asserts that the Company's observation at page 8 of its Return to the ORS motion to file under seal (that §58-4-55(A) does not contemplate that ORS can file a motion for leave to file under seal) is evidence of absurdity. *See* Response at 10. In context, this correct observation was intended to make clear that the Commission alone has the

D. <u>The Commission is authorized to impose sanctions and they are fully warranted.</u>

In its response, ORS does not expressly assert that the Commission lacks the power to impose sanctions; rather it argues that PUI's citation to Rules 26 and 37 of the SCRCP is inapt in view of PUI's assertion that ORS has not engaged in discovery. In order for this contention to be valid, the Commission must accept ORS's argument that ORS has engaged in discovery in this matter under §58-4-55(D). But even if the Commission does so, ORS is not rescued from its misconduct, as that subsection imposes on ORS the *same* confidentiality and non-disclosure obligations as are set out in §58-4-55(A). Regardless, ORS fails to address in any substantive manner the fact that the General Assembly has recognized that the Commission may impose sanctions. *See* S.C. Code Ann. §58-3-250 (A).

The ORS contention that the requested monetary sanctions are "completely out of proportion and unrelated to the improper conduct ORS alleges" (Response at 19) is without merit. ORS witness Loy has authored pre-filed testimony which improperly discloses the Company's responses to demands for production under §58-4-55 for the purpose of creating the false impression that PUI has not cooperated in ORS's audit, examination and inspection, and therein acknowledges that he drafted some of these demands. *See* Loy pre-filed direct testimony at p.18, l. 15-22. The Company seeks to ensure that its customers do not end up paying for Mr. Loy's work that has been used by ORS to violate the law and PUI's rights. *Cf.*, S.C. Code Ann. §58-4-100. The Company also seeks to have ORS deterred from such misconduct in the future. The proposed sanction is therefore both proportional and related to ORS's misconduct.

However, should the Commission be disposed to impose a monetary sanction in a lesser amount, PUI would note that it received on June 11, 2020, another invoice from ORS in the amount of $16,430 for services Mr. Loy appears to have rendered during the month of February 2020, including work he describes as "develop data requests."[15] Thus, the work described in this invoice

ability to determine whether it deems it necessary to view information produced under the statute. The Commission may take notice that, as courts often do when dealing with requests to disclose confidential or proprietary information, ORS is capable of describing generally the nature of the information it wishes to have the Commission view and the Commission may determine whether it will order ORS to file it under seal so that it may view it. Regardless, this point is only moot in view of the irrefutable fact that ORS has completely ignored the Commission's prerogatives in this regard.

[15]Included in Company witness Daday's prefiled rebuttal testimony is a recitation of the rate case expense incurred as of the date ORS prefiled its direct testimony which does *not* include this $16,430. Whether Mr. Loy was dilatory in submitting this invoice to ORS, or ORS was dilatory in sending it to the Company, is

directly relates to ORS's demands for production of books, records and information from PUI, and it would therefore be appropriate for the Commission to impose a sanction of at least this amount.

With respect to ORS's various other contentions that sanctions are unwarranted, Response at 20, PUI submits that none of them hold water. Asserting that a state agency must comply with a statute imposing an obligation upon it is hardly a "novelty." It is only by complying with its legal duties that ORS can provide PUI with the fair rate relief proceeding to which it is entitled and treat it with "integrity and equity." *Daufuskie, Peake, supra*. There is no duty on the part of PUI to designate as confidential or proprietary any non-disclosable matter produced to ORS (so PUI cannot have failed in that regard); to the contrary, ORS failed in its duty under the plain language of §58-4-55(A). Moreover, ORS has long been aware that PUI was asserting its rights under this statute. And PUI has repeatedly explained how this unlawful disclosure is harmful to the Company. ORS's arguments to the contrary are made on a post hoc basis to convey the utterly false impression that the Company did not cooperate with ORS in its audit, examination and inspection -- all for the purpose of disregarding "the legitimate financial interests of [a] South Carolina business" contrary to a direct judicial admonition to ORS that it not engage in "misconduct."[16]

IV. CONCLUSION

For the foregoing reasons, the Company's motion should be granted. The improperly disclosed matter and related ORS testimony should be stricken because it directly contravenes a mandatory statute binding upon ORS. A monetary sanction should be imposed upon ORS to avoid PUI customers paying for ORS' poor behavior and to deter it from repeating its misconduct.

Respectfully submitted,

s/John M. S. Hoefer
John M. S. Hoefer

unknown. Regardless, PUI was unaware of this invoice when the Company pre-filed its rebuttal testimony on May 9, 2020 (well before Loy's June 11 invoice). PUI reserves the right to include this amount in rate case expense should the Commission not direct it be withheld as a sanction.

[16] The Company leaves to the Commission's discretion whether to preclude ORS from filing surrebuttal testimony responsive to any additional rebuttal testimony it may allow PUI to file to address the content of the ORS testimonies which have violated the statute. The Commission should however, reject out of hand ORS's contention (Response at 2) that it has done "nothing wrong" in view of the plain meaning of §58-4-55(A). Accepting this contention will "necessarily affect the decision-making of the [C]ommission" in a manner that will deprive PUI "of the fair rate relief proceeding" ORS is obligated to provide the Company under *Daufuskie*.

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